



Consumer Electronics Association  
1919 South Eads Street  
Arlington, VA  
22202 USA  
(866) 858-1555 toll free  
(703) 907-7600 main  
(703) 907-7601 fax  
www.CE.org

**Via Electronic Filing**

February 22, 2012

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth St., S.W.  
Washington, DC 20554

Re: Commercial Availability of Navigation Devices, CS Docket No. 97-80;  
Compatibility Between Cable Systems and Consumer Electronics Equipment, PP  
Docket No. 00-67; Adams Cable Request for Waiver, CSR 8537-Z

Dear Ms. Dortch:

This letter is filed in response to the *ex parte* submission made on February 15 on behalf of Adams Cable Equipment, Inc. (Adams) in furtherance of its request for a waiver of the Commission's Common Reliance principles and regulations. As was set forth in the undersigned's letter of January 30, CEA's initial understanding of this waiver request was that it was similar in principle to the waiver granted to Baja Broadband which, although CEA had opposed, CEA understood to be subject to limitations as to financial hardship and available quantities, as well as limited sophistication of devices offered. CEA also remarked in its January 30 letter that Adams had not filed its application in Docket No. 97-80, as would and should be expected from an applicant seeking a fundamental and sweeping departure from an FCC regulation.

CEA's January 30 letter and the conversation with the Media Bureau that occasioned it were triggered by concerns over representations in a January 25 *ex parte* filing by Adams. In that letter, Adams clarified that it was seeking a waiver that would not be subject to any limitation as to hardship, quantity, or device capability. Adams has now further admitted in a February 15 letter that such a waiver would also apply equally to sales *back to MSOs*. Notably, Adams's February 15 letter does not seriously attempt to refute TiVo's concern<sup>1</sup>

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<sup>1</sup> *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Dkt. No. 97-80, Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Dkt. No. 00-67, Adams Cable Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-8537-Z, ex parte letter from Matthew Zinn, Sr. V.P./General Counsel, Secretary, and Chief Privacy Officer, Tivo Inc. to Marlene H. Dortch, Sec., FCC (Feb. 7, 2012).*

that distribution to MSOs, in fundamental contravention of 76.1204(a)(1), is the primary objective of this waiver application. Accordingly, CEA now recognizes and opposes this waiver application as a complete escape from Common Reliance and Section 76.1204(a)(1) itself.

In order to grant this waiver the FCC would now have to agree with these policy assertions, and hence, in this waiver proceeding, reverse more than a decade of factual and policy determinations:

- (1) That Common Reliance has served its purpose and can and should be effectively cast aside, notwithstanding the FCC's rules;
- (2) That Section 629's requirement of competitive, commercial availability of navigation devices is satisfied *so long as* a web site is established offering to sell integrated security, MSO-specific products to consumers; and
- (3) That the Commission can effectively eviscerate one of its regulations by waiver.

None of these assertions is sound. Here are some issues that require urgent and immediate FCC consideration.

(1) **Common Reliance.** The Commission has made a determination, challenged by the cable industry and upheld by the U.S. Court of Appeals, that it will not grant any further general relief from common reliance.<sup>2</sup> The Commission and the Court cited the poor support habitually given to CableCARD-reliant products, and the consequent reluctance of most manufacturers, retailers, and consumers to invest in them. Examples continue to flow into relevant Media Bureau dockets.<sup>3</sup> The simple assertions made in Adams's waiver application

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<sup>2</sup> *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report and Order at ¶ 3 (rel. Mar. 17, 2005); *Comcast Corp. V. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

<sup>3</sup> *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Dkt. No. 00-67, letter from Samuel Biller to Marlene H. Dortch, Sec., FCC (Feb. 6, 2012); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Dkt. No. 00-67, *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Dkt. No. 11-169, letter from Melissa Marks, General Counsel, Boxee to Marlene H. Dortch, Sec. FCC (Dec. 21, 2011); *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Dkt. No. 11-169, letter from Glenn Connery to FCC, re: Basic Service Tier Encryption; *Compatibility Between Cable Systems and Consumer Electronics Equipment* (Feb. 17, 2012).

and *ex parte* letters provide no basis substantively or procedurally to reverse this determination.

(2) **Commission Rejection of Integrated Security STBs As Compliance With Section 629.** Cable industry vendors and the NCTA have tried at least twice to persuade the Commission that “offering” retailers integrated security boxes satisfies an MSO’s obligations under Section 629. In the initial Notice of Inquiry, General Instrument Corporation proposed, as compliant with Section 629, *exactly* what Adams now proposes:

**Emergence of Alternative Consumer Distribution Channels.**

Consumers are purchasing products through television (e.g., home shopping) and through the Internet (e.g., online catalogs) on an increasing basis. The tremendous success of the PC mail order business is a good example of this phenomenon. The growth of these direct distribution channels has sparked the interest of MVPDs and their equipment suppliers who see in them a potential vehicle to increase deployment of MVPD customer equipment while minimizing security risks.<sup>4</sup>

The FCC instead implemented a regime based on separable security and which, as required by Section 629, relies on *private sector industry standards* to support truly competitive devices through common reliance. Nevertheless, in 2001 the NCTA again proposed,<sup>5</sup> as an alternative to common reliance, a “retail set-top box initiative” under which integrated security navigation devices would be provided directly to consumers. The FCC again, and since, has declined to find that the retail distribution of integrated security devices should be accepted in lieu of common reliance.<sup>6</sup>

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<sup>4</sup> Hence, GI proposed that distribution of integrated security set-tops should constitute compliance. *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Comments of General Instrument Corp. at 6 (emphasis in original); *see also* Comments of Scientific-Atlanta, Inc. at 2-3 (May 16, 1997).

<sup>5</sup> *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Robert Sachs, President & CEO, NCTA, to the Honorable Michael K. Powell, Chairman, FCC (Oct. 10, 2001).

<sup>6</sup> The FCC in October 2010 specifically addressed and rejected NCTA arguments that the “integration ban” was obsolete and should be repealed. *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Third Report and Order and Order on Reconsideration ¶ 51 (Oct. 14, 2010). The FCC therein reviewed a number of pending petitions and proposals with respect to CableCARDS and chose to leave Section 76.1204(a)(1) undisturbed except for the specific exemption it adopted. *See* ¶¶ 52-69.

(3) **Regulations May Not Be Eviscerated By Waiver.** The Commission cannot lawfully eviscerate one its regulations via waiver.<sup>7</sup> TiVo was correct in discerning and Adams has confirmed that if the Commission grants this waiver, then Adams (and presumably anyone else, as there would be no limitation based on hardship, frozen inventory, or device features) could “recondition” any integrated security product, acquired from anyone, and supply it to MSOs generally and without limitation. Adams does not argue that this would not substantially or entirely undermine Section 1204(a)(1). Rather, Adams argues that Section 76.1204(a)(1) is *no longer necessary* to implement Section 629. The FCC made a contrary determination as recently as October, 2010.<sup>8</sup> Therefore Adams’s remedy cannot be a grant of this waiver.

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Section 76.1204(a)(1) prohibits MSOs from placing into service new navigation devices with integrated security. For the reasons stated above, the Commission cannot and should not conclude in this proceeding that Adams or anyone else should be allowed to place integrated security navigation devices back on the market, where they can be acquired by MSOs and placed back into service. Nor should Adams and MSOs be allowed to accomplish the same result through a waiver allowing Adams to be the nominal vehicle by which integrated security navigation devices are offered to consumers generally and provisioned by MSOs for use on MSO systems.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission’s rules.

Respectfully submitted,

/s/ **Julie M. Kearney**

Julie M. Kearney  
Vice President, Regulatory Affairs

cc:

William Lake  
Brendan Murray

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<sup>7</sup> “The very essence of waiver is the assumed validity of the general rule .... [T]he agency’s obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.” *Wait Radio v. FCC*, 418 F.2d 1153, 1158 - 1159 (D.C. Cir. 1969).

<sup>8</sup> See n. 6.

Christy Adams  
Chief Executive Officer  
Adams Cable Equipment  
15560 West 100th Terrace  
Lenexa, KS 66219

Paul B. Hudson  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue NW  
Washington, D.C. 20006

## CERTIFICATE OF SERVICE

I do hereby certify that on February 22, 2012, I caused a true and correct copy of the foregoing ex parte comment of the Consumer Electronics Association to the Adams Cable Equipment, Inc. Request For Waiver of 47 C.F.R. § 76.1204 to be served via first-class mail on the following:

Christy Adams  
Chief Executive Officer  
Adams Cable Equipment  
15560 West 100th Terrace  
Lenexa, KS 66219

Paul B. Hudson  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue NW  
Washington, D.C. 20006

/s/ Patricia O'Keefe

Patricia O'Keefe  
Constantine Cannon LLP  
1301 K Street, N.W., 1050 East  
Washington, D.C. 20005